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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

BRYAN GOEKE,
Superintendent, Renz Correctional Center

Petitioner,

v.

LYNDA RUTH BRANCH,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented for Review

I.

Whether a new rule of law, that "substantive due process" prohibits a state appellate court from dismissing an appeal pursuant to the escape rule, can be applied retroactively in federal habeas corpus.

II.

Whether a state appellate court violates "substantive due process" in dismissing the appeal of a convicted felon who absconded before sentencing.

Table of Contents

Table of Authorities

Constitutional Provisions

Statutes

Court Rules

Judicial Decisions

Scholarly Authority

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Petitioner, Superintendent Bryan Goeke,[1] prays the Court for its order granting a writ of certiorari to review the judgment of the court below granting Respondent Branch's application for a writ of habeas corpus.

Opinions Below

The September 21, 1994, majority opinion of the United States Court of Appeals for the Eighth Circuit concerning which Superintendent Goeke seeks this Court's review, as well as the dissenting opinion of Judge Bowman (joined by Judges Beam, Loken, and Hansen), are available on WESTLAW at 1994 WL 513661, and on LEXIS at 1994 U.S. App. LEXIS

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[1]As Superintendent of the Renz Correctional Center, where Branch has been incarcerated throughout the proceedings in the lower courts, Bryan Goeke was the proper party respondent within the meaning of 28 U.S.C. § 2254, Rule 2(a). See App. 94.

26584. App. 1-16. These modified opinions replace the published opinions of June 28, 1994, reported at 27 F.3d 1334 (8th Cir. 1994). App. 27-41. The opinion of the district court is unreported. App. 17-26.

Jurisdictional Statement

The judgment of the United States Court of Appeals for the Eighth Circuit was initially entered on June 28, 1994. Over the dissenting opinions of four (4) of its members, the court of appeals en banc denied rehearing on September 21, 1994. The panel also denied rehearing, and issued revised opinions–majority and dissenting–on September 21, 1994. Superintendent Goeke invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

Constitutional Provisions and Statutes Involved

Section 1 of the fourteenth amendment to the Constitution of the United States provides, to the extent it has been invoked in the court of appeals, that: "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

Subsection (a) of 28 U.S.C. § 2254 provides, in relevant part, that "[t]he Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

Statement of the Case

Lynda Ruth Branch was charged in the Circuit Court of Cole County, Missouri, with having fatally shot her husband. The court ordered a change of venue to Cape Girardeau County. In October 1986 a jury found Branch guilty of murder in the first degree, Mo. Rev. Stat. § 565.020 (1986).

After a reversal and remand, State v. Branch, 757 S.W.2d 595 (Mo. Ct. App. 1988), and another change of venue, a jury in the Circuit Court of Boone County convicted Branch of first-degree murder for a second time on March 3, 1989. App. 44-46. The jury assessed her punishment as life imprisonment without eligibility for probation or parole. App. 44. The court continued Branch's bond; it set the case for disposition of Branch's motion for new trial, and presumably also for sentencing, for April 3, 1989. App. 47-48.

On that date Branch did not appear. App. 48-49. The prosecutor moved for bond forfeiture; the trial court granted the motion and set a hearing for rendition of judgment on the bond for May 1, 1989. App. 50. The trial court issued a capias warrant for Branch's arrest; it ordered that on her arrest she be held without bond. App. 53.

On April 6, 1989, law enforcement officers arrested Branch in Moniteau County, Missouri; officers returned her to the Circuit Court of Boone County. On April 10, 1989, the trial court held a sentencing hearing. App. 76; State v. Branch, 811 S.W.2d 11, 11 (Mo. Ct. App. 1991). The trial judge asked Branch if there was "any statement which [she wished] to make to the Court prior to imposing judgment and sentence." Concerning her failure to appear, she responded as follows:

> First and foremost I apologize for not appearing on the 3rd. My actions were just due to my confusion and my extreme emotional distress. The sentence the jury recommended was just beyond my comprehension.

Branch went on to make arguments against her conviction. App. 56-57. The trial court sentenced Branch in accordance with the verdict. App. 57.

Branch filed an appeal of the judgment and sentence against her. She also filed an action for post-conviction relief pursuant to Mo. S. Ct. R. 29.15. As required by subdivision (*l*) of Rule 29.15, the Missouri Court of Appeals held her direct appeal in abeyance while she litigated her post-conviction relief action. After an evidentiary hearing, the motion court denied relief on the merits. App. 62-74. Branch appealed that disposition as well. As provided by subdivision (*l*), her direct appeal and the appeal of the motion court's denial of post-conviction relief were consolidated.

The State moved to dismiss Branch's appeal on the basis of the escape rule. The Missouri Court of Appeals took the State's motion with the case, and the parties proceeded to submit briefs on the merits. After oral argument, the court dismissed Branch's consolidated appeal on the procedural basis the State had advocated, i.e., the escape rule. App. 76-78, 811 S.W.2d at 12.

Invoking 28 U.S.C. § 2254, Branch filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Missouri. Through counsel, she raised sixteen (16) asserted grounds for relief. App. 79-92. For her first ground, Branch argued that the dismissal of her consolidated appeal denied her due process of law and the equal protection of the laws (1) because her failure to appear for sentencing was not an "escape"; (2) because she had been in custody at the time of her appeals; (3) because neither the State nor the courts had been prejudiced or delayed by her failure to appear; and (4) because she had been denied a fair trial, in that her motion for new trial and the order denying her motion for post-conviction relief had never been reviewed on the merits by an appellate court. App. 84-85.

Superintendent Goeke responded that Missouri's escape rule applied to Branch's conduct, and argued that this Court and other federal courts had approved of the escape rule. App. 97-99. He argued that if the district court were to hold that the

state court's application of the escape rule was unconstitutional, it could not enforce this rule in the pending case consistently with Teague v. Lane, 489 U.S. 288 (1989). App. 99-100. Goeke invoked the procedural default arising from Branch's escape as barring consideration of her remaining asserted grounds for relief. App. 100-04.

After receiving a traverse from Branch, the district court denied relief. App. 17-26. It held that Branch had a state-created right to a direct appeal which the State could not take away without due process of law. App. 21. It quoted this Court's opinion in Mathews v. Eldridge, 424 U.S. 319, 335 (1976), as providing the analysis to be applied in deciding whether the deprivation was without due process. App. 22. Employing this "procedural due process analysis," the district court found that the right to a direct appeal was "important," and the risk of erroneous deprivation of this right was "substantial," but also found that "the burden on Missouri to provide a hearing on the reason why [Branch] did not comply with a court order is minimal," because the State has "a substantial interest in encouraging obedience to procedural rules and court orders." Because "the record shows that [Branch's] absence was not due to events beyond her control, but merely to her confusion and unwillingness to accept the verdict," her "right to due process was not violated . . . ." App. 23.[2]

Citing Eighth Circuit precedent–Buckley v. Lockhart, 892 F.2d 715, 718 (8th Cir. 1989), cert. denied, 497 U.S. 1006 (1990)–the district court agreed that Branch's escape was a procedural default barring consideration of her other asserted grounds for relief. Because it found that she had not shown

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[2]The district court analyzed the petitioner's equal protection claim in light of San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973). It held that because the petitioner had failed to allege membership in a "suspect class" or violation of a "fundamental right," the action of the Missouri Court of Appeals was subject to scrutiny only under the "rational basis" test. The district court held that the rationales which Missouri courts had given for enforcing the escape rule reflected "legitimate state interests," and that the escape rule "rationally further[ed] these interests." App. 24-25.

"cause" for her failure to appear, it enforced the default. App. 25-26.

The district court announced its judgment on September 23, 1992. App. 26. When Branch sought to appeal, the district court denied her motion for certificate of probable cause to appeal. The United States Court of Appeals for the Eighth Circuit treated her notice of appeal as an application for certificate of probable cause, and granted it on February 5, 1993.

On March 8, 1993, this Court announced its judgment in Ortega-Rodriguez v. United States, 113 S.Ct. 1199 (1993). Branch filed her brief on May 7, 1993, presenting one point on appeal: that "the Missouri Court of Appeals [had] violated her constitutional right to due process of law when it summarily dismissed her consolidated appeals based on the 'escape rule', in that the blanket application of the 'escape rule' was arbitrary and irrational because the court failed to consider that [she] had not yet initiated the appellate process . . . nor did her actions burden or delay the normal appellate process." App. 106.

Petitioner relied on Ortega-Rodriguez, arguing that the Missouri appellate court's handling of her appeal "clearly and directly conflicts with the principles announced in the recent opinion of the United States Supreme Court in Ortega-Rodriguez v. United States . . . ," and that in order to be valid, the escape rule "involves a fact-specific inquiry and recognizes discretionary application." App. 110. Branch quoted Mathews v. Eldridge as "set[ting] out the appropriate procedural due process analysis," but disagreed with the district court's application of this standard. App. 113. She argued that "[i]n light of the Ortega-Rodriguez case . . . the District Court erroneously held that [her] due process rights were not violated," because she had yet to invoke the appellate process when she failed to appear for sentencing, and her failure to appear did not delay the processing of her appeals. App. 114.

Superintendent Goeke responded that Ortega-Rodriguez did not apply to Branch's case, because it dealt with the "escape" or "fugitive dismissal" rule internal to the federal judiciary, and because it was decided under this Court's

supervisory power over the lower federal courts rather than as a constitutional question. Goeke argued that for these reasons, Branch's argument on appeal failed to justify relief in federal habeas corpus, because any assumed inconsistency with the rule of Ortega-Rodriguez would not violate the Constitution, laws, or treaties of the United States. App. 119-20. Goeke added:

> If this Court were to disagree, and believe that Ortega-Rodriguez was a constitutional rule, such a conclusion could not be enforced in this collateral-attack proceeding consistently with the principles set forth in Teague v. Lane, 489 U.S. 288, 299-316 (1989)(plurality opinion), and its progeny. See Doc. No. 3 at 7-8 [App. 99-100].

App. 129 n.5.

At oral argument, members of the panel phrased the issue before them as one of "substantive due process," and the respective counsel responded. App. 136-37, 147-49, 150-54 & 157-60.

On June 28, 1994, the court of appeals issued an opinion in this case, reasoning that "[t]he Due Process Clause contains a substantive component that protects individuals from government action that is arbitrary . . . , conscience-shocking . . . , oppressive in a constitutional sense . . . , or interferes with fundamental rights . . . ," and that the application of the escape rule to Branch violated this "substantive component" because it was "based on nothing more than [her] failure to appear as ordered for sentencing . . . ." App. 31 & 34 (citations omitted). At no point did the majority address the principle of non-retroactivity announced by this Court in Teague v. Lane and raised by Superintendent Goeke in his response to show cause, in his brief, and at oral argument. App. 27-34.

Judge Bowman dissented, pointing out that Branch had not clearly presented the substantive due process issue:

> It is not altogether clear to me that Branch's broad assertion of a due process violation, as set forth in her petition for the writ, properly raised the substantive due process issue in the District Court. It was not a subject of discussion in the court's denial of the writ. Moreover, the argument Branch makes in her brief is a procedural due process argument. See Brief of Appellant at 10-12. It was not until prodded by this Court at oral argument that counsel for Branch acknowledged he was advancing an argument based on substantive due process.

App. 35 n.1. Judge Bowman disagreed with the majority's resort to substantive due process, and argued that the Missouri Court of Appeals had not violated Branch's due process rights because there was no "fundamental right" to a criminal appeal. App. 37. He argued that this sanction did not "shock the conscience," because Branch was already subject to life imprisonment, and an additional sentence for escape from confinement would be an "indiscernibl[e]" deterrent. App. 37-38. Judge Bowman distinguished Ortega-Rodriguez, observing that "[i]t is of no consequence to the constitutionality of state procedures that the United States Supreme Court has used its supervisory power to limit the scope of the federal common-law escape rule." App. 40.

Superintendent Goeke filed a suggestion for rehearing en banc. In it he pointed out that the panel had decided the case on a theory not presented to the district court or in Branch's brief; he raised the Teague issue once more; and he attacked the application of "substantive due process" doctrine to the facts before the court.

On September 21, 1994, the Eighth Circuit denied rehearing en banc; Judges Bowman, Beam, Loken, and Hansen would have granted rehearing. App. 42-43. The panel issued revised majority and dissenting opinions. App. 1-16.

In its revised opinion, the panel majority ruled that the State of Missouri had waived a non-retroactivity defense. App.

4-5. It acknowledged that Branch had not pleaded substantive due process in either the district court or in her brief, but that the case was acknowledged to concern substantive due process at oral argument. Stating that it would be "inconsistent with substantial justice" not to consider substantive due process, the majority "exercise[d its] discretion" to do so. App. 5-6.

On Superintendent Goeke's unopposed motion, the Eighth Circuit has stayed its mandate pending the filing of this timely petition.

Argument

I. The court below decided a question of federal law in a way that conflicts with this Court's decision in Teague v. Lane, and its progeny, in that the court below retroactively applied a new rule of law–that "substantive due process" prohibits a state appellate court from dismissing an appeal pursuant to the escape rule–in a federal habeas corpus proceeding.

In the district court, Branch raised general due process and equal protection challenges to the application of the escape rule, and Goeke invoked the principle of Teague v. Lane as a defense against these claims. App. 84-85 & 99-100. The district court denied relief, employing a procedural due process analysis. App. 20-23.[3]

In her brief in the Eighth Circuit, Branch criticized the reasoning and result of the district court, but employed the same procedural due process standard; she added an invocation of this Court's intervening decision in Ortega-Rodriguez v. United States. App. 106-16. In his brief, Goeke defended the district court's decision, and cited this Court's decision in Teague v. Lane in direct response to the argument Branch had made on appeal. App. 117-29 & n.5.

At oral argument, the panel brought up the doctrine of substantive due process as a possible ground for decision. App. 137. Counsel for Goeke invoked Teague as precluding relief under that theory as well. App. 150-58.

In its initial two-to-one opinion, the panel majority granted relief on its substantive due process theory, without any reference to Goeke's invocation of this Court's decision in Teague. App. 27-41. Goeke pointed out this omission in his suggestion for rehearing, which was denied with four (4) dissenting votes. App. 42-43. The panel issued modified opinions, in which the majority based its refusal to apply Teague on the premise that Goeke had waived it. App. 4-5.

[3]In rejecting Branch's equal protection argument, the district court held that Branch had not shown that the Missouri Court of Appeals had violated a "fundamental right." App. 24.

A. Teague precludes the relief the panel granted.

In Gilmore v. Taylor, 113 S.Ct. 2112 (1993), this Court provided the authoritative method by which a lower court should apply the non-retroactivity principle set forth in Teague. In Gilmore v. Taylor, the Seventh Circuit had rationalized its finding that it was not creating "new law" by saying that the Supreme Court had announced a due process right to proper jury instructions. Id. at 2117. This Court rejected such generalized analysis, and asked, instead, whether the proposed rule was "dictated" or "compelled" by Supreme Court precedent. Id. at 2116, 2117 (emphasis by this Court). If a court had to "stretch" Supreme Court precedent to reach the facts before it, then the rule of decision is "new law." See id. at 2118. An "expansive reading" of Supreme Court precedent constitutes "new law," this Court said, and when the prisoner invokes a line of cases at "too great" a "level of generality," the Teague principle requires the court to withhold relief. Id. at 2119, citing Saffle v. Parks, 494 U.S. 484, 491 (1990).

This Court's decision in Caspari v. Bohlen, 114 S.Ct. 948 (1994)("Bohlen"), emphasizes the duty of a federal court to "[s]urve[y] the legal landscape" as it existed on the date the prisoner's conviction and sentence became final. 114 S.Ct. at 953, quoting Graham v. Collins, 113 S.Ct. 892, 898 (1993). In making this survey, one looks primarily to decisions of this Court. Id. at 956.

When this Court's decisions are applied to the panel majority's theory for granting relief in the instant case, it is clear that in this case the panel majority announced a "new rule."

Neither at the time Branch's conviction and sentence became final, *nor even at the time of the panel majority's opinion*, had this Court laid down a rule–based on "substantive

due process" or any other theory said to be derived from the Constitution of the United States–forbidding *any* appellate court from dismissing a criminal defendant's appeal because he or she had escaped, absconded, or failed to appear before filing an appeal. It has not done so today.

Only *after* Branch's conviction and sentence had become final–in 1991, State v. Branch, 811 S.W.2d 11 (Mo. Ct. App. 1991)–did the United States Supreme Court announce its opinion in Ortega-Rodriguez v. United States. It was decided under this Court's *supervisory* capacity over the other federal courts. It disapproved the former rule of *one* circuit that *automatically* dismissed the appeals of federal criminal defendants who escaped before they had filed their appeals. Even the panel majority acknowledges (in a parenthetical note after a citation) that this decision was not based on the Constitution of the United States. App. 7.

Although Goeke denies that Ortega-Rodriguez applies to the instant case, he points out that the Missouri Court of Appeals did not "automatically" dismiss Branch's appeals. She had an opportunity to explain why she did not appear for sentencing; she availed herself of the opportunity. App. 56. She received a full evidentiary hearing on her motion for post-conviction relief; the motion court reached the merits irrespective of her absconding. App. 62-74. Both her direct appeal and her post-conviction relief appeal were briefed on the merits and orally argued. App. 76. Only after all of this process did the state appellate court apply the escape rule. Even if the Eighth Circuit had supervisory jurisdiction over the Missouri Court of Appeals, therefore, Ortega-Rodriguez would not have supported–let alone "dictated" or "compelled" its decision.

As the sole support for its statement that "there is no rational justification for a state appellate court to strip the defendant of the right to appeal" absent demonstrable empirical effects on the appellate process, the panel majority cites Woods v. Kemna, 13 F.3d 1244, 1246 (8th Cir. 1994). Slip op. at 6. First, in Woods, the Eighth Circuit remanded the cause in order for the prisoner to present his claim to the state courts in light

of Ortega-Rodriguez. Any language in the Woods opinion concerning substantive due process was therefore obiter dictum. Second, Woods was not announced until approximately three (3) years after Branch's appeal had become final. Third, an opinion from a federal court of appeals does not "dictate" or "compel" relief by a state court. Lockhart v. Fretwell, 113 S.Ct. 838, 846 (1993)(Thomas, J., concurring).

Whereas there was no authority forbidding the state courts from enforcing the escape rule against defendants who escape before filing an appeal, there were several decisions by this Court enforcing or approving of the escape rule generally, four (4) of which involve the states. Estelle v. Dorrough, 420 U.S. 534, 541-42 (1975)(per curiam); Molinaro v. New Jersey, 396 U.S. 365, 366 (1970)(per curiam); Allen v. Georgia, 166 U.S. 138 (1897); Bonahan v. Nebraska, 125 U.S. 692 (1887); Smith v. United States, 94 U.S. 97 (1876). The lack of Supreme Court precedent "dictating" or "compelling" the grant of relief based on substantive due process is evidenced by the panel majority's failure to identify such precedent, to identify any precedent from the federal appellate or district courts (other than the Eighth Circuit's own Woods dictum), to identify any precedent from a state appellate court or even a scholarly treatise or journal articulating the "substantive due process" theory. App. 6-8.

Whether or not the panel majority's opinion is a *logical* extension of other cases–such as Ortega-Rodriguez–it is nonetheless an *extension*. The result reached by the panel majority was not "compelled" or "dictated" at the time the Missouri Court of Appeals dismissed Branch's consolidated appeals.

Even if the panel majority's "substantive due process" theory were a justifiable exercise of federal judicial power–an issue to be discussed in the second part of this petition–it should not have been announced and enforced for the first time on federal collateral attack, but only by this Court on a writ of certiorari from the Missouri Court of Appeals's dismissal of Branch's consolidated state appeals.

B. Goeke did not waive Teague.

After Superintendent Goeke drew the lower court's attention to the fact that the panel had failed even to address the Teague issue, the panel sought to avoid it once more by asserting that "Missouri" had "waived" the issue. App. 4-5.

1. Whether Teague *can* be waived in the lower federal courts is a question of federal law on which the circuits are divided.

The panel majority's refusal to apply Teague depends *entirely* on its finding that Goeke waived this issue. When the refusal to apply one of this Court's decisions relies *entirely* on the concept of waiver, it is important to clarify whether the defense *can* be waived. On this issue there remains a conflict among the circuits. Consequently, this Court's grant of certiorari is needed to resolve this conflict. S. Ct. R. 10.1(a).

Although most courts that have spoken to the issue have held that a respondent in a federal habeas corpus action can waive the non-retroactivity principle of Teague to raising it too late in a habeas corpus action, the Fifth Circuit has found a split of circuits on the issue. Smith v. Black, 904 F.2d 950, 981 & n.12 (5th Cir. 1990), vacated on other grounds, 112 S.Ct. 1463 (1992), comparing Hill v. McMacklin, 893 F.2d 810, 823 (6th Cir. 1989), overruled on other grounds, Couch v. Jabe, 951 F.2d 94, 96 (6th Cir. 1991)(per curiam)(question of state-court reliance on procedural bar), with Hanrahan v. Greer, 896 F.2d 241, 245 (7th Cir. 1990), reaff'd in pertinent part, Hanrahan v. Thieret, 933 F.2d 1328, 1337 n.7 (7th Cir., cert. denied, 112 S.Ct. 446 (1991).[4]

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[4]Although the Seventh Circuit is one of the courts holding that a respondent can waive the non-retroactivity principle of Teague v. Lane, 489 U.S. 288 (1989), it has also held that even indirect, "abbreviated" invocations of Teague will defeat a claim of waiver, so long as they put the deciding court "on notice" of the issue. Daniel v. Peters, 1994 WL 574121

In Hill v. McMacklin, the Sixth Circuit considered the non-retroactivity principle in spite of the fact that the parties had not raised it. In Hopkinson v. Shillinger, 888 F.2d 1286, 1288 (10th Cir.)(en banc), cert. denied, 497 U.S. 1010 (1990), the Tenth Circuit held that in spite of a respondent's failure to raise a non-retroactivity defense *at all*, the court raised the issue "because the very scope of the writ of habeas corpus, and therefore our power to grant relief, is implicated."

The position of the Fifth, Sixth, and Tenth Circuits is superior to that of the Eighth and others because it distinguishes between defenses that exist solely to minimize the paperwork arising from civil litigation, on the one hand, and defenses of a constitutional dimension, on the other. Subject-matter jurisdiction falls into the latter category, in that a lower federal court does not have the power to decide a case unless that Congress has conferred that power on it. Teague falls somewhere in between, implicating both the *purpose* of federal habeas corpus review (and, hence, whether Congress intended for federal courts to entertain petitions on the merits under the circumstances of any given case) and convenience on the part of the respondent.

In Granberry v. Greer, 481 U.S. 129, 131, 133 (1987)(citing cases), this Court recognized that a respondent could waive the requirement of exhaustion of state remedies codified in 28 U.S.C. § 2254 (b) & (c), whether the omission to plead nonexhaustion is inadvertent or tactical. That decision rests on the premise that the exhaustion requirement exists to protect the states's interests in resolving constitutional issues in their own courts. In Granberry, however, this Court did not adopt a monolithic position that the respondent's counsel may *either* deny the state courts the protection of the exhaustion requirement, *or* "sandbag" by reserving the nonexhaustion defense until after a federal court has decided to grant relief. Instead, when the respondent does not raise the exhaustion issue, the federal court is under a duty to exercise *discretion*

(No. 92-2091)(8th Cir. Oct. 19, 1994)(per curiam).

whether to reach the exhaustion issue. Id. at 134-36. This Court set forth the considerations that should inform the exercise of that discretion; disagreement with the requirement itself was not one of them.

In respect to Teague, the question is whether the activity of applying new rules of constitutional law lies within the proper function of the federal courts, as this Court and the Congress conceive of that function, *whether or not the states would find that convenient*. Thus, it is–as the Tenth Circuit has held–closer to subject-matter jurisdiction, and is not so easily waived as the Eighth Circuit would have it.

It is one thing to say that Teague's principle of non-retroactivity is non-jurisdictional, in the sense that a federal court is not *bound* to inquire into it sua sponte. Caspari v. Bohlen, 114 S.Ct. at 953.[5] Goeke did not *expect* the Eighth Circuit to inquire into the non-retroactivity principle sua sponte. App. 99-100, 129 n.5, & 150-58. The question is whether some more demanding standard of pleading and proof may be required to have this Court's Teague decision followed than is required in respect to other legal rules.

This Court's decisions in Schiro v. Farley, 114 S.Ct. 783, 788-89 (1994); Godinez v. Moran, 113 S.Ct. 2680, 2685 n.8 (1993); Collins v. Youngblood, 497 U.S. 37, 40-41 (1990), have not obviated the conflict between the circuits to which Goeke refers. Cf. Caspari v. Bohlen, 114 S.Ct. at 952-53 (reaching Teague issue even though not expressly raised in petition for certiorari, because it a necessary predicate to the question presented).

In each of these cases, the party invoking Teague in this Court had not invoked it in the party's petition for certiorari or its brief in opposition. In light of this Court's limited and

[5]As a matter of principle, it is important to recall that *this Court* considered the non-retroactivity principle important enough to raise it sua sponte in the first place. Saffle v. Parks, 494 U.S. 484, 498 (1990)(Brennan, J., dissenting)(retroactivity issue not raised by respondent); Teague v. Lane, 489 U.S. at 390 (plurality opinion)(retroactivity issue raised only by amicus curiae).

discretionary jurisdiction, and the special requirements affirmatively (and prospectively) imposed on parties submitting briefs in opposition to certiorari (S. Ct. R. 15.1), these decisions do not dispose of the question whether an *inferior* federal appellate court, having *general* appellate jurisdiction over the district courts, may refuse to consider Teague *solely* because of the format in which it was presented.

2. Goeke raised and preserved the Teague issue throughout the proceedings below.

Assuming arguendo that a respondent in a federal habeas corpus action *can* waive Teague, Superintendent Goeke did not do so. Goeke asserted Teague generally when Branch made a general combined due process and equal protection claim in the district court. App. 99-100. He cited it in specific response to the argument that Ortega-Rodriguez applied to the states via the due process clause, when Branch made that argument in her brief before the Eighth Circuit. App. 129 n.5.

It is true that Superintendent Goeke did not *anticipate* the panel's substantive due process theory expressed for the first time at oral argument. As Judge Bowman observed (App. 10-11 n.1), however, Branch did not invoke "substantive due process" either in the district court or in her brief on appeal, and the district court did not address it. Instead, the *court* brought up substantive due process for the first time at oral argument. App. 137.

Branch's counsel stated the question on appeal as "whether imposing [dismissal as a sanction for escape] automatically rather than as a discretionary function was a proper use as it was applied to Lynda Branch in this matter." App. 131. He argued that "the primary case in this is the case of Ortega-Rodriguez . . . ." App. 132.

The court asked Branch's counsel, "what's the substantive component in due process that derails Missouri's reliance on expecting people to keep their time schedules as a matter of state law, and if they don't they lose their rights?"

Counsel responded that Missouri could do so, but that it needed to "show some connection with the appellate process" to employ the sanction which had been imposed on Branch. App. 136-37. A member of the court asked: "So . . . you're really making a substantive due process argument, a kind of fundamental right argument?" Branch's counsel answered: "That's correct." App. 137.

At the outset, counsel for Superintendent Goeke referred to the fact that Branch was asking the court to apply a rule of law "for the first time." App. 150. He observed that "the court has very ably confined this debate to one of substantive due process," and argued that *this* Court would not read Ortega-Rodriguez to state a constitutional rule. App. 151. He argued that the rule of decision under discussion would be a "new rule of law," and that "[c]onsequently, the prohibition of Teague against Lane on the enforcement of new rules of constitutional law for the first time in a collateral attack proceeding in federal court applies with full force to this case." App. 151-52.

Goeke's counsel pointed out that the Missouri Court of Appeals had taken the motion to dismiss with the case, and had enforced the escape rule only after the case had been briefed and orally argued. A member of the panel suggested that counsel for Branch had "concede[d] that there's no procedural due process issues involved here," and that "[i]t's a question of substantive due process . . . ." Counsel responded: "That's certainly -- that is the question as presented today, and it came out very clearly in petitioner's oral argument, and it's Teague barred." App. 153 (emphasis supplied). For the next four (4) appendix pages, members of the court and Goeke's counsel continued to discuss the Teague issue--in the specific context of the substantive due process theory raised at oral argument. App. 154-58.

In support of its assertion of waiver, the panel suggests the existence of a novel rule of appellate procedure, in which a party waives Teague by raising it in a footnote:

> Missouri [*sic* for 'Goeke'] waived Teague's nonretroactivity principle in responding to Branch's appeal. Missouri mentions the principle only twice in its brief. In the procedural history section, Missouri states that it raised the Teague principle in the district court. Missouri later mentions the principle in a one-sentence footnote buried on the last page of the state's lone argument--that the district court properly rejected Branch's due process claim on the merits. Missouri did not mention the nonretroactivity principle or cite Teague in its statement of the issues on appeal, and did not develop the Teague issue with supporting argument in its brief. Under these circumstances, Missouri waived our consideration of the Teague issue.

App. 5 (citing three court of appeals decisions, none of them involving Teague, only one of them announced before the filing of Goeke's brief, and only one of the by the Eighth Circuit).[6] Cf. Ford v. Georgia, 498 U.S. 411, 421-25 (1991)(lower court's procedural rule may not defeat application of this Court's constitutional decision when rule was not in existence at the time the party relying on this Court's decision would have had to assert it under subsequently created rule).

The Eighth Circuit's Rules of Appellate Procedure expressly provide for the use of footnotes in briefs before it--requiring that they "must be printed or typed in the same size type as the text of the brief." 8th Cir. R. App. P. 28A(a). Presumably this requirement was promulgated on the premise that the footnotes will be *read*.

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[6]In the only case the panel majority cites in support of its finding of waiver that was decided before the filing of Goeke's brief (on June 24, 1993), the First Circuit deemed a criminal defendant's presentation of an entrapment argument waived by "cursory presentation," and that court made the point for which the panel majority cites it *in a footnote*. United States v. Panet-Collazo, 960 F.2d 256, 261 n.3 (1st Cir.), cert. denied, 113 S.Ct. 220, and cert. denied, 113 S.Ct. 645 (1992).

The panel disparages Superintendent Goeke's invocation of Teague in his brief by referring to it as "one[]sentence." App. 5. Although all federal courts of appeals have *maximum* lengths for briefs, there is no *minimum* length requirement known to federal appellate procedure. Fed. R. App. P. 28(g). Some objections *can* be adequately stated in one sentence.

Finally, the panel refers to the placement of Superintendent Goeke's citation of this Court's decision in Teague as "buried on the last page [i.e., page *18*] of the state's lone argument." App. 5. *Branch* had only *one* point on appeal, and Goeke's brief responded to *hers*–not to her theory *and* to the different theory that members of the panel brought up for the first time at oral argument. Surely the panel does not mean to suggest that when a single point on appeal is subject to several threshold defenses, the appellee must have a *separate* point on appeal for *each* defense or else will waive a defense which *this* Court or the Congress has determined to preclude federal habeas corpus relief.

Goeke raised Teague in the district court, in his appellee's brief, and at oral argument. What else did he have to do to preserve this defense for consideration? If there is anything more that a party must do to preserve Teague, then both the lower federal courts and those who represent habeas corpus respondents before them need guidance from this Court. S. Ct. R. 10.1(a)(need for exercise of this Court's supervisory powers as ground for granting certiorari).

Goeke respectfully suggests that in the instant case, the court below has once more "plainly misread [this Court's] precedents." Delo v. Lashley, 113 S.Ct. 1222, 1224 (1993), granting certiorari and summarily reversing, 957 F.2d 1495 (8th Cir. 1992). The judgment of the court below should be reversed.

II. The court below decided a federal question in a way that conflicts with Reno v. Flores, Bowers v. Hardwick, Estelle v. Dorrough, and other decisions of this Court in holding that a state appellate court violates "substantive due process" by dismissing the appeal of a convicted felon who absconded before sentencing.

As this Court has long recognized, "substantive due process" is a suspect ground for any decision. E.g., Lochner v. New York, 198 U.S. 45, 75-76 (1905)(Holmes, J., dissenting). As it explained in Bowers v. Hardwick, 478 U.S. 186, 194-95 (1986):

> The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930's, which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments.

On the basis of its experience with the exercise of judicial power under the rubric of "substantive due process," this Court has adopted a method for the consideration of claims under the due process clauses which would approach or exceed the limits of its legitimate power.

In Reno v. Flores, 113 S.Ct. 1439, 1447 (1993), for example, this Court asked, *first*, whether the governmental policy under attack infringes on a "'fundamental' liberty interest," and, *if* it does, *then* whether "the infringement is narrowly tailored to serve a compelling state interest." If no "'fundamental' liberty interest" is implicated, then the policy is not unconstitutional so long as it meets "the (unexacting)

standard of rationally advancing some legitimate governmental purpose . . . ." Id. at 1148-49 (emphasis supplied).

In Bowers v. Hardwick, 478 U.S. 186, 194-95 (1986), this Court set forth the considerations bearing on the declaration of "fundamental rights" whose infringement will justify strict judicial scrutiny:

> There should be . . . great resistance to expand the substantive reach of [the Due Process] Clauses [of the Fifth and Fourteenth Amendments], particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority.

In Bowers v. Hardwick, the Court declined to extend the scope of "fundamental rights" beyond marriage, child-rearing, procreation, contraception, and abortion to include certain private, consensual homosexual acts.

The claim in Bowers was far more modest than the panel majority's holding in the instant case. It was like those in Griswold v. Connecticut, 381 U.S. 479 (1965); Loving v. Virginia, 388 U.S. 1 (1967); and the other cases on which Hardwick had relied, in that it involved sexuality, and sought to keep government regulation out of a private sphere.[7] This

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[7]In the subsequent decision of Planned Parenthood v. Casey, 112 S.Ct. 2791, 2805-06 (1992), the plurality of the Justices found a unifying principle in the unenumerated rights that this Court had recognized as "fundamental": "a promise of the Constitution that there is a realm of personal liberty which the government may not enter." Without disparaging the abstract *importance* of appeals, civil and criminal, there are fewer activities less "private" or "personal" than a process in which the criminal appellant is rarely present when briefs are written or cases argued, and which frequently results in an opinion discussing his or her most painful and embarrassing moments being placed in every law library of any size in the country.

Court declined to expand the category of "fundamental rights" *not* because of a lack of similarity of the subject-matter, but in light of the long-standing, nearly unanimous *legal condemnation* of sodomy, especially at the time of the ratification of the fifth and fourteenth amendments. 478 U.S. at 191-93 & nn. 5-7.

Criminal appeals and post-conviction relief appeals are radically different from the intimate conduct or family relations that appear to link Bowers with the other cases of this nature in which the Court has applied the due process clause to strike down state and federal policies. Yet the Court declined to do so in Bowers. It follows that the court below should not have done so in the instant case.

In Branch's case, the panel majority conceded that there is no federal constitutional right to a direct appeal of a criminal conviction. App. 6. See Evitts v. Lucey, 469 U.S. 387, 393 (1985); Jones v. Barnes, 463 U.S. 745, 751 (1983); Ross v. Moffitt, 417 U.S. 600, 610-11 (1974); McKane v. Durston, 153 U.S. 684, 687-88 (1894).[8] On account of her absconding, the Missouri Court of Appeals denied Branch's *post-conviction relief* appeal, as well as her direct appeal. App. 78. There is no federal constitutional right to state post-conviction relief proceedings, even at the trial-court level, let alone to an appeal from the denial of such relief. E.g., Coleman v. Thompson, 501 U.S. 722, 755-57 (1991)(citing cases).

To expand the category of "fundamental rights" to include a criminal direct appeal and a post-conviction relief

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[8]Indeed, even if the panel majority's opinion were to allowed to stand, there would *still* be no federal constitutional right to appeal. The panel majority's opinion does not purport to create a general federal constitutional right to appeal. Instead, it divides convicted criminals into *three categories*: (1) those who do not escape; (2) those who escape before filing an appeal, and are recaptured within a few days; and (3) those who escape after filing an appeal. Under the panel majority's opinion, prisoners in the first and third categories have no right to an appeal. Under its opinion, only the prisoners in the second category have such a right. Rather than creating a federally-protected right to appeal, the panel opinion creates a qualified right to escape, then appeal.

appeal would invite thousands of new claims sounding in substantive due process. For example, an appellant may claim that a state's length limitation on briefs infringes, without a sufficiently persuasive basis, his or her right to appeal. If a state appellate court may not deny a criminal defendant appellate review over a motion court's denial of post-conviction relief because he or she absconded–it will be argued–surely it may not deny this opportunity to a well-behaved prisoner who filed the motion a date late. If a state appellate court may not deny a criminal defendant the opportunity to take a direct appeal because he or she absconded–it will be argued–surely it may not deny this opportunity to a well-behaved prisoner whose lawyer files the brief a date late. And if a state must provide a prisoner who has escaped and been recaptured within three (3) days a post-conviction relief appeal, then certainly it cannot deny him or her *counsel* to brief and argue it.

Goeke's concerns are by no means hypothetical. At this writing (November 1994), the panel majority's Branch opinion is not yet printed in the Federal Reporter, Third Series, yet the Eighth Circuit has begun citing it for the proposition that "due process analysis applies to both direct and post-conviction review" in the state courts. Easter v. Endell, 1994 WL 570804, slip op. at 5 (No. 94-1255)(8th Cir. Oct. 20, 1994)(reversing district court's denial of relief because Arkansas appellate court did not make post-conviction remedy "reasonably accessible").

Once the lower federal courts become involved in second-guessing the state courts over their appellate practice on the basis of "substantive due process," there will be no clear line between constitutional adjudication–in which they act within their lawful authority–and the application of federal common law to the actions of state courts within their own jurisdictions. If a tie to the Constitution, laws, and treaties of the United States as ad hoc and subjective as the one in this case sufficed to justify the exercise of what amounts to supervisory power over the state courts, then a state-court appeal has truly become a "tryout on the road" for the "real" confrontation in the "real" courts. That is not the law. Wainwright v. Sykes, 433 U.S. 72, 90 (1977).

Assuming that there was a need to create a category of non-textual "fundamental rights" in the first place, there is no need to do so in the field of criminal procedure. The Bill of Rights spells out the protections of the rights of the accused that are fundamental in our legal culture. These include procedures analogous to appeals, including grand-jury indictment and jury trial. If the Framers had intended to include a first appeal as of right, it would have been simple enough for them to have done so.

In fact, there was no "first appeal as of right" at common law. E.g., McKane v. Durston, 153 U.S. at 687.[9] The First Congress, which adopted the Bill of Rights and sent it to the states, did not provide for *any* criminal appeals in the Judiciary Act of 1789. 1 Stat. 73. In the federal courts, criminal appeals as we know them were not introduced until 1889.[10] Thus, at the time the Bill of Rights was adopted, *and* at the time the due process clause of the *fourteenth amendment*

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[9]"A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law, and is not now, a necessary element of due process of law. It is wholly within the discretion of the state to allow or not to allow such a review. A citation of authorities upon the point is unnecessary." McKane v. Durston, 153 U.S. 684, 687 (Harlan, J.)(emphasis supplied).

[10]"Until 1889 criminal cases were reviewable by the Supreme Court only in the event of a division of opinion in the circuit court on a question of law (Act of April 29, 1802, § 6, 2 Stat. 156, 159-61 [certification]; Act of June 1, 1872, § 1, 17 Stat. 196) or within the limited range of issues that could be raised by habeas corpus. . . . The Act of February 6, 1889, § 6, 25 Stat. 655, 656 granted a writ of error in capital cases only, extended by the Evarts Act [i.e., the Act of March 3, 1891, 26 Stat. 826] to 'infamous crimes.'" P. Bator et al., Hart & Wechsler's The Federal Courts & The Federal System 1539 n.3 (2d ed. 1973). Lest there be any doubt, the "circuit courts" to which this quotation refers were the *trial* courts in all federal criminal cases, with the exception that the district courts had concurrent jurisdiction to try "certain minor criminal offenses." Id. at 34.

was adopted, there was no right to an appeal in a criminal case arising in the courts of the United States.[11]

Even allowing for the vast difference of subject-matter between the "fundamental rights" this Court identified in Bowers, applying the standard it set out in that decision leads to the conclusion the opportunity to appeal a criminal conviction is not a "fundamental" right for the purpose of decision-making under the due process clause.

After it held that the Georgia sodomy statute attacked in Bowers did not infringe on a "fundamental right," this Court considered the argument that it was nonetheless unconstitutional because it lacked a "rational basis." Hardwick contended that the statute had no basis "other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable." This Court responded:

> The law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.

Id. at 196. So here, if this Court were to hold that the Missouri Court of Appeals could not enforce the escape rule against Branch because it was "only" justified by a moral belief (that one who seeks the remedial offices of the law should render herself amenable to them), then *every* rule of law about which there was room for good-faith difference of opinion would be liable to constitutional challenge.

There are, undoubtedly, laws on the books which reflect moral beliefs that are no longer held as widely as they were when the laws were adopted. Attacks on rules of law on this basis are particularly inappropriate to federal habeas corpus,

[11]Although the State of Missouri was decades ahead of the federal jurisdiction in this respect, it provided for appeals by statute rather than as a matter of constitutional right. Mo. Rev. Stat. 498 § 1 (1835).

however, which exists not to make new policy, but to deter violations of *existing* rules of federal constitutional law. Teague v. Lane, 489 U.S. at 305-07, citing Solem v. Stumes, 465 U.S. 638, 653 (1984)(Powell, J., concurring in the judgment); Mackey v. United States, 401 U.S. 667, 682-83 (1971)(Harlan, J., concurring in judgments in part & dissenting in part); Desist v. United States, 394 U.S. 244, 262-63 (1969)(Harlan, J., dissenting).

One of the messages of the panel majority's opinion is that the purpose of promoting respect for the legal system is not an adequate basis for the application of the escape rule. App. 8-9. At least when it is expressed as a constitutional judgment–as it must be, to be enforceable in federal habeas corpus–this decision conflicts squarely with this Court's opinion in Estelle v. Dorrough.

In Dorrough, the prisoner had escaped for only two (2) days. Because the Texas appellate court dismissed his appeal *after* his recapture, there is no way in which the escape could have delayed its processing of his appeal or interfered with its operations in the narrow manner that the court below found necessary in order to justify application of the escape rule. 420 U.S. at 534-35. In its per curiam opinion reversing a lower court's grant of relief, this Court pointed out that the statute codifying the Texas escape rule was justified by broader policies: "It discourages the felony of escape and encourages voluntary surrenders. It promotes the efficient, dignified operation of the [state appellate court]." Id. at 537 (footnotes omitted). Finding that the right to appeal a criminal conviction is not a "fundamental right" for the purpose of equal protection analysis, this Court applied the "rational basis" or "mere rationality" test. Id. at 538-41, citing, inter alia, San Antonio Indep. School Dist. v. Rodriguez, supra; Morey v. Doud, 354 U.S. 457, 463-64 (1957). Relying on the purposes of "deterring escapes and encouraging surrenders," this Court upheld the Texas escape rule.

If the panel majority's opinion is correct, then this Court's decision in Estelle v. Dorrough should be overruled. Just as in the instant case, Texas could not show that its

appellate court processes were delayed on account of Dorrough's two-day flight. Under the panel's reasoning, *that* is essential to the constitutional application of the escape rule. Deterring escapes and encouraging defendants to turn themselves in are insufficient grounds for applying the escape rule. To use the panel majority's expression, it "goes against the grain of due process." App. 9.

As Judge Bowman observed in his dissenting opinion, a second type of substantive due process argument is that the official conduct to be proscribed by the court's decision "shocks the conscience" of the deciding court. App. 13-14, citing Rochin v. California, 342 U.S. 165, 172 (1952). The panel majority cites Rochin as one of several asserted sources for authority to scrutinize the substance of federal and state laws under the due process clause. App. 6.

Judge Bowman has thoroughly answered the suggestion that the application of the escape rule in this case "shocks the conscience." App. 13-14. His appreciation for the constitutionality of deterrence as a quasi-legislative purpose for the escape rule is consistent with this Court's decision in Dorrough; the panel majority's rejection of it is not. In Ortega-Rodriguez v. United States, 113 S.Ct. at 1201, this Court indicated that lower federal courts may establish categories of escapees to which the escape rule will be applied automatically; as Goeke pointed out in his brief before the Eighth Circuit, persons under sentence of death or of imprisonment for life would be excellent candidates for such a categorical exception. App. 121 n.2. Judge Bowman's appreciation of the fact that a defendant under sentence of life without parole will not be deterred by the threat of a consecutive sentence for escape from confinement is consistent with this Court's decision in Ortega-Rodriguez; the panel majority's opinion is not. His resistance to the "temptation to find in the Constitution a license to write into the law our personal vision of how things ought to be," App. 16, is consistent with the structure of the Constitution itself, as well as with this Court's experience with "substantive due process"; the panel majority's result in this case is not.

In Herrera v. Collins, 113 S.Ct. 853, 864-70 (1993), this Court referred to an argument that it should have applied "substantive due process" analysis to the petitioner's claim that it would violate the due process clause to execute an innocent person. This Court observed that the argument "put[] the cart before the horse," because it presumed that the petitioner was innocent. The question before the Court was whether the prisoner was entitled to federal collateral scrutiny of his *claim* that he was innocent–years after his conviction, its affirmance on appeal, and the denial of previous state and federal habeas corpus petitions. The Court held: "This issue is properly analyzed only in terms of procedural due process." Id. at 864 n.6 (emphasis supplied).

In his dissenting opinion in Lochner v. New York, Justice Holmes reminded his Brethren that our Constitution "is not intended to embody a particular economic theory," but "is made for people of fundamentally differing views . . . " 198 U.S. at 75-76.

So in the instant case, the Constitution does not embody a strictly utilitarian theory of punishment–such that a rule of state law may be upheld on federal collateral attack only if it can be statistically supported by narrowly functional results. On the question of what sanctions a state may impose on a convicted murderer who absconds before filing an appeal, the Constitution does not command the people of the State of Missouri to believe the teachings of nineteenth-century utilitarian philosophers, under which the imposition of the escape rule would arguably be justified only to the extent that it serves the convenience of docket clerks. A Constitution "made for people of made for people of fundamentally differing views" allows the people of the State of Missouri to follow the reasoning of Socrates that by escaping, Branch "intend[ed], so far as [she had] the power, to destroy . . . the laws, and the whole state as well." Plato, Crito 50a-b (trans. H. Tredennick), in E. Hamilton & H. Cairns, eds., Plato: The Collected Dialogues 35 (1961). Adoption of the latter view would support the "disentitlement" theory whether or not the escape took place before the defendant had filed an appeal.

Following the wisdom of Justice Holmes, this Court has held that the people of the United States and of the several states may adopt different theories of jurisprudence in respect to the death penalty. Gregg v. Georgia, 426 U.S. 153, 174-88 (1976)(plurality opinion). Specifically, the people need not be able to support a deterrence theory with statistical evidence demonstrating that availability or imposition of the death penalty results in a decrease in capital crimes. Id. at 184-87.

In this case, as well, the due process clause of the fourteenth amendment does not forbid the State of Missouri from adopting a theory concerning the availability of appellate and post-conviction remedies that a majority of a given federal court would find insufficiently precise. The contrary judgment of the court below should be reversed.

Conclusion

WHEREFORE, Superintendent Goeke prays the Court for its order issuing a writ of certiorari and reversing the judgment of the court below.

Respectfully submitted,

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